UPS Ground Freight, Inc. *and* International Brotherhood of Teamsters Local 773. Case 04–CA–205359

June 1, 2018

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS PEARCE AND MCFERRAN

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed on August 30, 2017, by International Brotherhood of Teamsters Local 773 (the Union), the General Counsel issued the complaint on September 13, 2017, alleging that UPS Ground Freight, Inc. (the Respondent) has violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to recognize and bargain with it following the Union's certification in Case 04–RC–165805. (Official notice is taken of the record in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(d). *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint, and asserting affirmative defenses.

On October 12, 2017, the General Counsel filed a Motion for Summary Judgment. On October 17, 2017, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. On November 20, 2017, the Respondent filed a Corrected Opposition to the Motion for Summary Judgment, Response to the Notice to Show Cause, and Cross-Motion for Summary Judgment.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

The Respondent admits its refusal to bargain,[1] but contests the validity of the Union's certification of representative on the basis of its contentions, raised and rejected in the underlying representation proceeding, that the unit is not appropriate under the Act because it should have included employees at additional locations and it should have excluded certain other employees, that the Board's Final Rule regarding the Board's election processes is unlawful, and that the Region's application of the Board's Final Rule was unconstitutional, unlawful, and arbitrary.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding.[2] The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor has it shown any special circumstances that would require the Board to reexamine the decision made in the representation proceeding.

In its answer to the complaint and in its opposition to the Motion for Summary Judgment, the Respondent raises a number of additional arguments in support of its contention that the complaint should be dismissed. For the following reasons, we find that these arguments do not raise any material issues warranting the reexamination of the representation case or the denial of summary judgment.

First, we find no merit to the Respondent's argument that the complaint is barred by Section 10(b) of the Act because the August 30, 2017 charge was filed more than 6 months after the Respondent's February 23, 2017 refusal to bargain with the Union. The Board has held that even where there was an initial request and refusal to bargain outside of the 10(b) period, a respondent's later refusal to bargain after a subsequent bargaining request made during the certification year constitutes an independent unfair labor practice for 10(b) purposes. Thus, in *Bentson Contracting Co*., 298 NLRB 199 (1990), enf. denied on other grounds, but affd. in pert. part 941 F.2d 1262, 1264–1265 fn. 2 (D.C. Cir. 1991), the Board held that, as a matter of law, successive refusals to bargain during the certification year are separate unfair labor practices based on the obligation to bargain that was established, both factually and legally, by the Board's certification, and cannot be deemed "merely reiterations of an initial refusal to bargain." 298 NLRB at 200. In *Bentson*, the Board held that the fact that there may have been a separate earlier refusal to bargain "is simply irrel-

[1] Although the Respondent denied the allegations in par. 4 of the complaint regarding the Sec. 2(13) agency status of its legal counsel, based on its assertion that the phrase "at all material times" is vague, the Respondent admitted the allegations in par. 7 of the complaint that about August 24, 2017, by letter from its legal counsel, the Respondent stated that it would not recognize or bargain with the Union. Accordingly, we find that the Respondent's denial of par. 4 does not raise any issue warranting a hearing.

[2] One of the arguments reiterated by the Respondent in its Opposition to the Motion for Summary Judgment is that *Specialty Healthcare and Rehabilitation Center of Mobile*, 357 NLRB 934 (2011), enfd. sub nom. *Kindred Nursing Center East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013), was wrongly decided and should be overruled. However, in its July 27, 2017 Decision on Review and Order, the Board did not rely on *Specialty Healthcare* in denying review of the Acting Regional Director's finding that the petitioned-for unit was appropriate. *UPS Ground Freight, Inc.*, 365 NLRB No. 113, slip op. at 1 fn. 1 (2017). Accordingly, *Specialty Healthcare* is not applicable in this case.

evant for the purpose of the 10(b) limitation." Id. See also *St. Francis Healthcare Centre*, 325 NLRB 905, 905 fn. 2 (1998), enf. denied on other grounds 212 F.3d 945 (6th Cir. 2000). Here, there is no dispute that the charge in this case was filed and served on the Respondent on August 30, 2017, less than 6 months after the Respondent's August 24, 2017 clear refusal to bargain following the issuance of the Board's July 27, 2017 Decision on Review and Order (365 NLRB No. 113), in which it ruled on the Respondent's request for review of the Acting Regional Director's Decision and Direction of Election and Supplemental Decision on Objections to Election and Certification of Representative. Because the August 24, 2017 refusal to bargain occurred during the certification year, we find no merit to the Respondent's argument that the complaint is time-barred because the charge was filed more than 6 months after the Respondent's earlier February 23, 2017 refusal to bargain.

Moreover, even assuming arguendo that the February 23, 2017 refusal to bargain was relevant to the 10(b) analysis, the Board has held that the 10(b) period does not begin to run until the charging party receives "clear and unequivocal notice," either actual or constructive, that an unfair labor practice has occurred. *Leach Corp*., 312 NLRB 990, 991 (1993), enfd. 54 F.3d 802 (D.C. Cir. 1995); *Christopher Street Owners Corp*., 286 NLRB 253 (1987) (10(b) period does not begin to run until it becomes clear that the employer is refusing to recognize and bargain with the union), enfd. 847 F.2d 835 (2d Cir. 1988). Here, until the Board issued its July 27, 2017 Decision on Review and Order, it was not certain that the Respondent's refusal to bargain constituted an unfair labor practice. See, e.g., *Land-O-Sun Dairies, LLC*, 357 NLRB 755, 756 (2011) (finding, in a unit clarification context, that the earliest date on which the union could have had clear and unequivocal notice of the unlawful conduct was the date the Board denied the respondent's request for review). Thus, any prior refusal to bargain did not constitute clear and unequivocal notice that an unfair labor practice had occurred. Accordingly, we find that the August 30, 2017 charge was timely filed and not barred by Section 10(b) of the Act.

Second, we find the Respondent's argument that the complaint is barred by the doctrine of laches to be similarly meritless. The Board and the courts have long held that the defense of laches does not lie against the Board as an agency of the United States Government. *Garda CL Atlantic, Inc.*, 365 NLRB No. 108, slip op. at 1, fn. 1 (2017); *Entergy Mississippi, Inc*., 361 NLRB 892, 893 fn. 5 (2014) (citing *NLRB v. J. H. Rutter-Rex Mfg. Co*., 396 U.S. 258 (1969)), affd. in relevant part 810 F.3d 287, 298–299 (5th Cir. 2015).

Third, we reject the Respondent's assertion that this case should be dismissed or transferred to a different Region because of an appearance of partiality and a conflict of interest in Region 4 resulting from misconduct by the Regional Director. The Respondent argues that the Region's partiality is evident because "every single substantive ruling by the Region" in the representation case resulted in "detriment" to the Respondent. We find no merit in these contentions. The Board has held that the resolution of all issues in favor of one party is insufficient to support a finding of bias or prejudice. *Teamsters Local 722 (Kasper Trucking)*, 314 NLRB 1016, 1030 (1994), enfd. 57 F.3d 1073 (7th Cir. 1995); *Penn Color, Inc.*, 261 NLRB 395, 395 fn. 1 (1982), enfd. 716 F.2d 891 (3d Cir. 1983); *Dimensions in Metal, Inc.*, 258 NLRB 563, 563 fn. 1 (1981). Further, the Respondent has not shown that the Regional Director's misconduct had any impact on the Region's rulings in this case. The Regional Director was recused from acting in this matter and there is no indication that he had any involvement in the processing of this case. The Respondent's unsubstantiated claim that the Regional Director's misconduct tainted the rulings made by the Region and called into question the entire election process is insufficient to raise a reasonable doubt as to the fairness and validity of the election. See, e.g., *Polymers, Inc.*, 174 NLRB 282, 282 (1969) ("The question which the Board must decide in each case in which there is a challenge to conduct of the election is whether the manner in which the election was conducted raises a reasonable doubt as to the fairness and validity of the election"). Accordingly, we find that the Respondent has failed to establish that the motion should be denied on this basis.

We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).

Accordingly, we grant the Motion for Summary Judgment and deny the Respondent's Cross-Motion for Summary Judgment.[3]

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent has been a corporation with an office and place of business in

[3] Chairman Ring did not participate in the underlying representation proceeding. He agrees with his colleagues that the Respondent has not raised any litigable issue in this unfair labor practice proceeding and that summary judgment is appropriate, with the parties retaining their respective rights to litigate relevant issues on appeal.

Kutztown, Pennsylvania (the facility), and has been engaged in the nationwide distribution of freight.

During the 12-month period preceding issuance of the complaint, the Respondent, in conducting its operations described above, purchased and received at the facility goods valued in excess of $50,000 directly from points outside the Commonwealth of Pennsylvania.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following the representation election held by mail ballot from January 11 through January 29, 2016, the Union was certified on March 11, 2016,[4] as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> INCLUDED: All regular full-time and part-time road drivers employed by the Employer at its facility located at 9755 Commerce Circle, Kutztown, Pennsylvania.
>
> EXCLUDED: All other employees, guards, and supervisors as defined in the Act.[5]

The Union continues to be the exclusive collective-bargaining representative of the unit employees under Section 9(a) of the Act.

B. Refusal to Bargain

About August 22, 2017, the Union, by email to the Respondent's legal counsel, requested that the Respondent bargain collectively with the Union as the exclusive collective-bargaining representative of the unit. About August 24, 2017, the Respondent's legal counsel, by letter, stated that the Respondent would not recognize or bargain with the Union. Since about August 24, 2017, the Respondent has failed and refused to recognize or bargain with the Union.

We find that the Respondent's conduct constitutes an unlawful failure and refusal to recognize and bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By failing and refusing since August 24, 2017, to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co*., 136 NLRB 785 (1962); accord *Burnett Construction Co*., 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964).

ORDER

The National Labor Relations Board orders that the Respondent, UPS Ground Freight, Inc., Kutztown, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with International Brotherhood of Teamsters Local 773 as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

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[4] On July 27, 2017, the Board granted the Respondent's request for review with respect to the supervisory status of dispatcher Frank Cappetta, but denied the request for review in all other respects. On review, the Board found that Cappetta was not a statutory supervisor. 365 NLRB No. 113 (2017).

[5] In the certification, the Regional Director stated that "dispatchers and certified safety inspectors are neither included in nor excluded from the bargaining unit." We reject the Respondent's argument that it could not have violated the Act because it is not clear whether dispatchers and certified safety inspectors are part of the unit description. Any doubts as to the unit description could have been resolved through discussions with the Union, and, that failing, through a unit clarification petition. See, e.g. *New York Law Publishing* Co., 336 NLRB No. 93, slip op. at 2 (2001) (not reported in Board volume).

INCLUDED: All regular full-time and part-time road drivers employed by the Employer at its facility located at 9755 Commerce Circle, Kutztown, Pennsylvania.

EXCLUDED: All other employees, guards, and supervisors as defined in the Act.[6]

(b) Within 14 days after service by the Region, post at its facility in Kutztown, Pennsylvania, copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Acting Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 24, 2017.

(c) Within 21 days after service by the Region, file with the Acting Regional Director for Region 4 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. June 1, 2018

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John F. Ring, Chairman

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Mark Gaston Pearce, Member

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Lauren McFerran, Member

[6] Dispatchers and certified safety instructors are neither included in nor excluded from the bargaining unit.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with International Brotherhood of Teamsters Local 773 (the Union) as the exclusive collective-bargaining representative of our employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the following appropriate bargaining unit:

INCLUDED: All regular full-time and part-time road drivers employed by us at our facility located at 9755 Commerce Circle, Kutztown, Pennsylvania.

EXCLUDED: All other employees, guards, and supervisors as defined in the Act.*

* Dispatchers and certified safety instructors are neither included in nor excluded from the bargaining unit.

UPS GROUND FREIGHT, INC.

The Board's decision can be found at www.nlrb.gov/case/04-CA-205359 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.